No. 83-1038

In the Supreme Court of the United States

October Term, 1983

ESTATE OF JESSIE E. KERBER, Helen Doring, Executrix,

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA,

Defendant-Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, as a matter of law, an executrix's reliance on professionals to prepare and file a timely federal estate tax return can ever constitute reasonable cause to excuse the statutory penalties for late filing.

2. Whether the instant record supports a determination that the executrix's reliance on professionals constituted "the exercise of ordinary business care and prudence" so as to excuse the statutory penalties for late filing.

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No.

In the Supreme Court of the United States

October Term, 1983

ESTATE OF JESSIE E. KERBER, Helen Doring, Executrix,
Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA,
Defendant-Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Eighth Circuit

PETITION FOR CERTIORARI

CITATION TO OPINIONS BELOW

The opinion of the District Court is unofficially reported at 83-1, U.S.T.C. ¶ 13,524 (W.D.Mo. 1983).

The opinion of the Court of Appeals is reported at 717 F.2d 454 (8th Cir. 1983).

BASIS FOR JURISDICTION IN THIS COURT

The Judgment of the Court of Appeals was entered on September 23, 1983. Jurisdiction to review this judgment is conferred by 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6651. FAILURE TO FILE TAX RETURN OR TO PAY TAX.

(a) *Addition to the tax.*—In case of failure—

(1) to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), . . . on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in aggregate; . . .

Treasury Regulation § 301.6651-1(c)(1):

. . . If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause.

STATEMENT OF THE FACTS

This is a civil action for refund of penalties imposed because of the late filing of a federal estate tax return. The plaintiff-executrix of the estate of Jessie E. Kerber ("Executrix") maintains that the penalty should have been

abated for reasonable cause, *i.e.*, her reliance upon her lawyer and accountants to prepare and file the return by the due date thereof. The Executrix paid the penalties imposed and sued for a refund in District Court. After depositions and execution of a stipulation of facts, both parties moved for summary judgment. The trial court's memorandum decision, while noting the opposing policy arguments, did not analyze or weigh the evidence; rather it held for the Government on the basis of the existence of a rule of law in the Eighth Circuit that reliance on professionals to file a federal estate tax return on time does not constitute reasonable cause, citing *Boeving v. United States*, 650 F.2d 493 (8th Cir. 1981), and *Estate of Lillehei, v. Commissioner*, 638 F.2d 65 (8th Cir. 1981). The Eighth Circuit affirmed the trial court's reliance on *Boeving* and *Lillehei* without delineating what more the Executrix could have done to satisfy the reasonableness standard and thereby avoid the imposition of penalties.

Helen Doring, then a 76-year-old retired retail clerk with a 10th grade education, became the Executrix of the estate of her good friend, Jessie E. Kerber, who died without close relatives surviving her. Although wholly inexperienced in such matters, she attempted to discharge her duties in proper fashion. Thus, within a week following Mrs. Kerber's death on October 10, 1977, Helen engaged Michael Harris, Esq., whom she had known since he was a child, and for more than 10 years as a competent attorney. Harris had also been the attorney for Mrs. Kerber's guardian prior to her death. He advised Helen that an estate tax return might be necessary, but that since he had no experience with actually preparing these returns, a C.P.A. should be hired for that task. Harris' understanding was that the return would have to be filed within 12 months of Mrs. Kerber's death, although the

record is not clear as to whether he told this to Helen.[1] Acting through the Probate Court, on March 29, 1978, Helen hired William Anderson, a C.P.A. who came highly recommended, to prepare and file the federal estate tax return.

During 1978, Helen spent considerable time attempting to discharge her executrix duties, talking to Harris as much as six or seven times a week. Similarly, she called Anderson at least a dozen times and made a minimum of five visits to his office to inquire of his progress. In fact, he had done nothing on the Kerber matter. After concluding that Anderson had no real interest in working on the estate tax return, Helen petitioned the Court for a replacement in June. At Harris' suggestion she engaged Robert Sanger as her new accountant. Helen first met Sanger on August 4, 1978, at which time he advised her that the return was already late. Sanger immediately filed for an extension of time and forwarded to the I.R.S. a check for $80,000.00 as payment for the estate tax liability. A few days later Sanger sent an additional $23,000.00 on account, explaining to Helen that these payments would toll whatever penalties might accrue because of the late filing. Sanger moved with dispatch to file the return but didn't receive critical expert valuations necessary to compute the actual tax due until late September. By transmittal letter dated October 10, 1978—received by the I.R.S. on October 13—Sanger filed the return. As

1. Helen was 80 years old at the time of her deposition and she frankly could not remember precisely what she was told four years before with respect to the due date of the federal estate tax return. Helen testified that while she did not remember what date Harris told her, he did mention a specific date. She further stated that she never knew, prior to meeting the second accountant, that the return was due within nine months of the date of death. Harris testified that if he told her a due date it would have been 12 months.

filed, the return showed an overpayment of $22,831.50 which the I.R.S. promptly adjusted in large part, by imposing a failure-to-file penalty of $19,004.22 and a failure-to-timely-pay penalty of $400.84.

BASIS FOR FEDERAL JURISDICTION

The Executrix exhausted her administrative remedies in seeking relief from the penalties, then paid and sued for a refund in the District Court, invoking 28 U.S.C. 1346 (a)(1) as a basis for federal jurisdiction.

REASONS FOR ALLOWANCE OF THE WRIT

I. Irreconcilable Conflict Among The Circuits

Section 6075(a) of the Internal Revenue Code of 1954 requires that a federal estate tax return is due within nine months of the date of death of a decedent. If the return is not timely filed, Section 6651(a)(1) provides a penalty of 5 percent per month or fraction thereof up to a maximum of 25 percent, "unless it is shown that such failure is due to reasonable cause and not due to wilful neglect. . ." Treas. Reg. § 301.6651-1(c)(1) defines what constitutes reasonable cause, as follows:

> If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause.

Thus, in determining whether a taxpayer such as the instant Executrix is excused from the Section 6651(a)(1) late-filing penalty, the issue is whether she exercised "ordinary business care and prudence."

Although it dealt with income taxes, the seminal case in this area of reliance on tax professionals is *Hatfried, Inc. v. Commissioner,* 162 F.2d 628 (3d Cir. 1947). There the Court held that the corporate taxpayer in fact and in law satisfied the ordinary business care and prudence standard by relying on expert legal advice in connection with the filing of a personal holding company return. The Court rejected the concept that taxpayers, as principals, were liable for the acts and conduct of their fiscal agents, arguing that such concept did violence to the plain intent of Congress as expressed in the statute. The Court also noted that the penalties imposed under the revenue laws were designed to proscribe conduct on the part of the taxpayer "which is intentional, or knowing, or voluntary, as distinguished from accidental. . ." *Id.* at 632. Three years later in *Haywood Lumber & Mining Co. v. Commissioner,* 178 F.2d 769 (1950), the Second Circuit formalized the reasonable cause exception, as follows (*Id.* at 771):

> When a corporate taxpayer selects a competent tax expert, supplies him with all necessary information and requests him to prepare proper tax returns, we think the taxpayer has done all that ordinary business care and prudence can reasonably demand.

The *Haywood* test was later applied in many late filing cases involving both estate and income tax returns, including, *Rohrabaugh v. United States,* 611 F.2d 211 (7th Cir. 1979); *Sanderling, Inc. v. Commissioner,* 571 F.2d 174 (3d Cir. 1978); *In re Fisk's Estate,* 203 F.2d 358 (6th Cir. 1953); *Staff v. United States,* 46 A.F.T.R.2d ¶ 148,404, at 6144 (W.D.N.Y. 1980); *Daley v. United States,* 480 F.Supp. 808 (N.D. 1979); *Giesen v. United States,* 369 F.Supp. 33 (W.D.Wis. 1973); *Estate of Lammerts,* 54 T.C. 420 (1970), modified, 456 F.2d 681 (2d Cir. 1972); *Estate of Duttenhofer,* 49 T.C. 200 (1967), aff'd, 410 F.2d 302 (6th Cir. 1969); and

Estate of Mayer, 43 T.C. 403 (1964), aff'd, 351 F.2d 617 (2d Cir. 1965), cert. denied, 383 U.S. 935 (1966).

In the intervening years there has been a large number of cases in the late-payment area, some of which were decided adverse to the taxpayer on the facts, and others whose reasoning have been at substantial variance with the *Hatfried-Haywood* analysis. An early example of the contra authority is *Ferrando v. United States,* 245 F.2d 582 (9th Cir. 1957), where the Court imposed a duty upon the executor to retain some control over estate matters since "[t]he filing of a tax return when due is a personal, nondelegable duty of the taxpayer. . ." *Id.* at 589. See also, *United States v. Kroll,* 547 F.2d 393, 396 (7th Cir. 1977); *Millette & Assoc., Inc. v. Commissioner,* 594 F.2d 121, 124-25 (5th Cir.), cert. denied, 444 U.S. 899 (1979); and *Fleming v. United States,* 648 F.2d 1122, 1127 (7th Cir. 1981).

Against this backdrop, the Eighth Circuit has decided five estate tax, late-filing penalty cases since the beginning of 1981: *Estate of Lillehei v. Commissioner,* 638 F.2d 65 (1981); *Boeving v. United States,* 650 F.2d 493 (1981); *Smith v. United States,* 702 F.2d 741 (1983); *Crouse v. United States,* 711 F.2d 102 (1983), and the instant case. All these cases were *per curiam* decisions, except *Boeving,* which had another, unrelated issue requiring some analysis. The rationale for rejecting the taxpayer-executor's reliance on professionals to file a timely estate tax return in all these cases was based on the Court's view that the executor had "a personal and nondelegable duty to ascertain the due date of the return and to insure that the attorney prepares and files the return on time" (*Estate of Lillehei, supra* at 66), and "reliance on the mistaken advice of counsel is not sufficient to constitute 'reasonable cause' for failing to fulfil that [personal and nondelegable] duty" (*Boeving, supra* at 495). While in the third case, *Smith,* the Eighth Circuit

seemed to be saying that they were not establishing "a rule of law that a personal representative's reliance on counsel can *never* constitute reasonable cause under section 6651(a)(1) for failing to file a timely return," its actions speak to the contrary. In *Smith, Crouse* and the instant case, the Court rejects the taxpayer's position, without analysis, by simply stating that those cases do not present any facts that distinguish the circumstances there from those present in *Boeving* and *Estate of Lillehei.*[2]

The Eighth Circuit's position in these five cases is diametrically opposed to the recent decision of the Seventh Circuit in *Boyle v. United States,* 710 F.2d 1251 (June 24, 1983), request for rehearing *en banc* denied, Oct. 11, 1983, per discussion with the Government's attorney.[3] The Court firmly rejected an interpretation of reasonable cause as turning on any notion of a nondelegable duty on the part of the executor,[4] as follows (*Id.* 1254):

> The circuits which have adopted a *per se* rule that reliance on counsel is not 'reasonable cause' have relied,

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2. This petition is not the place to argue our case on the merits, but we submit that there are substantial factual distinctions within these cases which were extensively argued on brief to the Court. For example, the instant Executrix paid the entire tax within days of learning the return was not timely filed and some two months before the return could be filed, a circumstance which at least should have been sufficient to cut off the penalty. See, *e.g., Rohrabaugh v. United States,* 611 F.2d 211 (7th Cir. 1979), where the Court noted the quick action taken once the taxpayer was made aware that the filing deadline had passed, thus helping to establish the presence of ordinary business care and prudence.

3. It is interesting to note that even under the rationale used in the dissenting opinion in *Boyle,* the Executrix here would likely have prevailed. Judge Posner stated that, "[i]f Boyle had asked his lawyer when the deadline was and the lawyer had misinformed him, that might be reasonable cause for the late filing." *Id.* at 1257.

4. The Seventh Circuit states therein that only three circuits have unequivocally adopted a *per se* rule that reliance on counsel does not constitute "reasonable cause" within the meaning of Section 6651(a)(1), the Fifth, Eighth and Ninth.

in part, on their conclusion that the executor's duty to file a timely estate tax return is non-delegable. However, it is very easy for judges to speak of non-delegable duties and to impose on laymen standards of 'reasonable care' for handling their legal affairs. Judges have, of course, extensive education and experience in the law. Ordinary laymen do not and they view most legal proceedings as somewhat imposing and mysterious. It is, therefore, not surprising that they should rely on their attorneys to handle their legal affairs.

The issue then is whose conduct is being measured in Section 6651(a)(1), the taxpayer-executor's or the professional's. The *per se* circuits, including the Eighth would clearly measure the professional's conduct and ascribe it to the client under the agency theory.[5] The other circuits, now including the Seventh, would measure only the principal's conduct in determining whether reasonable cause for the late-filing exists. This Court should accept certiorari to clarify the hopelessly muddled situation in the circuits and return some degree of certainty to this important area of tax law.

II. Elemental Fairness In Imposing Tax Penalties Is An Important Question Of Federal Tax Policy

There is not a great deal of money at stake in this case, nor, indeed, in any of the large number of estate tax

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5. This is most clearly exemplified in the majority opinion in *Fleming* and the dissenting opinion in *Rohrabaugh*, which describe the attorney as the agent of the executor and saddle the executor with the knowledge, or lack of it, of his agent. *Fleming, supra* at 1127, and *Rohrabaugh, supra* at 220. As observed by the dissenting judge in *Fleming*, this "guts" whatever meaning there may be in "reasonable cause" and imposes vicarious liability on the taxpayer for late filing in every instance. *Fleming, supra* at 1127.

penalty cases handed down in the last few years.[6] Yet the issue is of extreme importance, not only to the individual taxpayer caught up in the sharp conflicts noted in the above cases, but to the government and taxpayers at large. This importance stems from the nature of the money exacted—a penalty for the taxpayer's conduct which, in many instances, is without blemish. As this Court said in *Spies v. United States,* 317 U.S. 492, 496 (1943):

> [I]t is not the purpose of the law to penalize . . . innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay.

In the present age of market rate interest for tax deficiencies, what was raised in *Spies* 30 years ago rings even more true today. The Government has taken the position—presumably for ease of administration—that reliance on a professional to file an estate tax return cannot, under any circumstances, constitute reasonable cause for its late filing. This position first bore fruit in flagrant fact patterns in cases such as *Ferrando, supra,* which involved criminal fraud and *Kroll, supra,* where the return was more than a year late and the executor, with some law school experience, ignored an I.R.S. notice that the return was due for nine months. The Government is now attempting, with some success, to elevate cases that it has won on favorable facts into an erroneous rule of law covering all late-filing cases and thereby emasculate the statutory and regulatory standard.

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6. A cursury review of the CCH Federal Estate Tax Reporter reveals that these penalty cases are by far the most litigated estate tax issue over this period.

When a penalty must be assessed it should be asessed for opprobrious conduct, not because of some innocent error by an 80-year-old executrix with a 10th grade education. The Government, backed by some of our circuit courts, has gone too far in the name of ease of administration. The result not only is perceived to be unfair; it is unfair. We cannot expect voluntary, national acceptance of our tax system when innocent taxpayers are punished by the imposition of severe penalties for reasonable reliance on advice of counsel.[7] Unless this Court accepts certiorari and reverses the Eighth Circuit's position, it is manifestly clear that it is a waste of time to litigate the issue further in this circuit, whatever the attractiveness of the facts. District Courts within the Eighth Circuit have been put on notice that the matter is a rule of law which cannot be affected by the facts. If, on the other hand, a taxpayer is fortunate enough to live within the Seventh Circuit, he can expect a fair hearing on the underlying facts. This gross inequity can only be corrected by this Court.

Again we return to the primary issue before this Court: under the Congressional mandate to excuse the penalty for reasonable cause and not wilful neglect, could Mrs. Doring's conduct in relying on advice of professionals constitute such reasonable cause? Describing her obligation to file a timely tax return in terms of a nondelegable duty subverts the statutory and regulatory stan-

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7. On oral argument of the instant case the Government attorney suggested that Mrs. Doring did not have to take on the responsibilities of an executrix if she didn't feel that she could carry them out, to which Judge Henley responded, how would she know. This is precisely our point. A penalty is here being exacted for wholly innocent conduct—because she was so unsophisticated and uneducated not even to recognize that she was receiving incompetent advice.

dard.[8] Indeed, it is anomalous that any court could hold that entrusting a complicated estate tax return to professionals would be anything less than ordinary business care and prudence. Under the instant facts what more could have been expected of Mrs. Doring? Despite her advanced age and lack of education and business experience, she was active in the extreme in constantly checking with her attorney on estate affairs and prodding her first accountant to proceed with the tax return. She finally fired him and hired a second accountant who gave her the reasonable-sounding but faulty advice that if she paid an estimated tax in full she could avoid any further liability for the penalty. She immediately paid the entire tax, indeed overpaid it by some $22,000.00. Yet when the return was finally filed after a three-month, three-day delay,[9] the I.R.S. is asking her to suffer a penalty of nearly $20,000.00. Would one seriously suggest that the Executrix should pull out the Internal Revenue Code (two volumes) or the accompanying Regulations (four volumes) and peruse through them to substantiate the tax advice given her by paid professionals, whose advice she had no reason to question? We hardly think so.

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8. Some courts have suggested that the answer is a malpractice suit against the offending professional. Such strategy is not the answer here, for who is Helen Doring to sue: the first accountant who did nothing but was fired before the due date for the return; the second accountant who did not begin work until the time for filing the return had run, and although he gave her the incorrect advice about paying the tax as a means of stopping the penalty, did diligently and properly prepare and file the return; or the attorney who told her up front that he was not well versed in tax matters and strongly suggested that an expert be engaged to prepare the tax returns?

9. A final irony in this case is that although the return was filed within the 12 months that was originally thought to be the proper time period, a penalty for the fourth month was added because the return was mailed on the last day of the time period. If timely, mailing is filing, but when filing late, mailing is not filing. Although the I.R.S. had the estate's money some two months before, this added another $5,000.00 to the penalty.

We strongly urge that the proper test to qualify for the reasonable cause exception of Section 6651(a)(1) is as set forth more than 30 years ago in the *Haywood* case: to engage professional help, supply that professional with all necessary information, and maintain reasonable contact with him. The plain language of the statute and regulations require no greater duty.

RELIEF REQUESTED

The Executrix requests that, based on the foregoing argument, the Court grant certiorari because of the substantial and irreconcilable conflict among the circuits on this important issue of federal tax law.

Once granted, the Court should, based on the undisputed facts in this record, reverse the decision of the Court of Appeals and enter judgment for the Executrix for the amount requested in the Complaint, plus interest according to law.

Date: December 21, 1983

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 81-6061-CV-SJ

ESTATE OF JESSIE E. KERBER, HELEN DORING, EXECUTRIX,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER

This suit, brought pursuant to 28 U.S.C. § 1346(a)(1), seeks a refund of certain penalties assessed upon the late filing of an estate tax return by plaintiff. The due date of the return and the amount of the penalty, should a penalty be warranted, are not in dispute. The issue for decision is whether plaintiff's failure to timely file was "due to reasonable cause and not due to willful neglect," 26 U.S.C. § 6651(a), the statutory criteria for excusing the imposition of a penalty. The parties have entered into extensive stipulations. Pending are their cross-motions for summary judgment. We grant defendant's motion and deny plaintiff's motion.

FACTS[1]

Jessie E. Kerber died on October 10, 1977. Helen Doring, a friend of the decedent, was appointed as executrix of Ms. Kerber's estate. Ms. Doring, who was 76 years old at the time, had been educated through the tenth grade and had work experience as a bank teller, a bookkeeping clerk, a store clerk, and a hotel clerk. Ms. Doring engaged Michael P. Harris, Esq. to represent her as executrix and to handle the probate of the estate. Harris had been licensed to practice law in Missouri since 1965 and had engaged in a general practice in St. Joseph since 1968. Harris stated in his affidavit that Doring took an active role in consulting with him concerning the administration of the estate. Harris informed Doring that it might be necessary to file an estate tax return. Harris believed that the due date for a return would be October 10, 1978, one year after the death of Kerber. In fact, a return was due on July 10, 1978, nine months after Kerber's death. 26 U.S.C. § 6075(a).[2] Doring stated in her deposition that Harris had told her a specific due date for the return. Harris stated in his deposition that he did not remember relating the due date to Doring, but that, if he had, he would have indicated that the return was due on October 10, 1978.

On March 29, 1978, C. William Anderson, a Certified Public Accountant, was engaged to prepare the estate tax

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1. The findings of fact are drawn from the stipulations of the parties and the depositions of Harris and Doring. Defendant has contended that two factual issues are in dispute: whether Doring was told of the due date by Harris and what the nature of the contracts between Doring and Harris concerning the probate administration were. In light of our holding, we need not decide whether genuine issues exist as to these factual matters, as the facts are not material to the decision.

2. An amendment reducing the filing period from 15 to 9 months was enacted in 1970. Pub. L. No. 91-614.

return. After Doring made a number of calls to check in Anderson's progress, she determined that no progress was being made on the return and Anderson was discharged on June 15, 1978. At the same time, Robert C. Sanger, a Certified Public Accountant, was hired to replace Anderson. Harris did not provide Sanger with information concerning the estate until August 2, 1978. At this time, Sanger learned of the date of Kerber's death for the first time. Sanger thereupon filed for an extension of time to file the return, along with a check for $80,000 as an estimated tax payment.[3] Sanger met with Doring for the first time on August 4, 1978. An additional check for $23,000 was mailed to the Internal Revenue Service on August 9, 1978. Sanger believed that payment of the estimated taxes would eliminate the imposition of any further penalty and so advised Doring and Harris. In fact, penalties continued to accrue until a return was filed. 26 U.S.C. § 6651. The last piece of information necessary to complete a return, a report of an appraiser concerning certain property held by the estate, was received by Sanger on September 26, 1978. A return was filed on October 10, 1978. The penalties here in issue were subsequently assessed and plaintiff filed a claim for refund, which was denied. This suit followed.

LEGAL CONCLUSIONS

Plaintiff is responsible for the penalties assessed unless the failure to timely file the estate tax return was due to "reasonable cause." If the executrix "exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then

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3. There is no indication in the record as to what became of the request for extension. It may be presumed it was not granted, given the continuation of the penalty.

the delay is due to a reasonable cause." 26 C.F.R. § 301.6651-1(c)(1). The essence of plaintiff's claim is that Doring exercised ordinary business care and prudence in relying on Harris and Sanger's advice concerning due dates and penalties. Defendant contends that an executor has a personal and nondelegable duty to file a timely return, which may not be excused by reliance on counsel.

A taxpayer's reliance on professional advice that the filing of a tax return is not required has been held to excuse the assessment of a penalty. *United States v. Kroll*, 547 F.2d 393 (7th Cir. 1977); *Burton Swartz Land Corp v. Commissioner*, 198 F.2d 558 (5th Cir. 1952); *Estate of Christ v. Commissioner*, 54 T.C. 493, 553-554 (1970), *aff'd on another issue*, 480 F.2d 171 (9th Cir. 1973); *West Coast Ice Co. v. Commissioner*, 49 T.C. 345, 351-352 (1968). Whether a taxpayer may similarly rely on professionals to correctly ascertain relevant filing deadlines and comply with them is, however, a matter in considerable controversy. One line of cases holds that such reliance may constitute reasonable cause in some cases, depending on factors such as the relative sophistication of the taxpayer, whether the taxpayer was informed of the due date, and whether the taxpayer inquired of the professional concerning progress on the return. *Rohrabaugh v. United States*, 611 F.2d 211 (7th Cir. 1979); *Gray v. United States*, 453 F. Supp. 1356 (W.W.Mo. 1978); *Estate of DiRezza v. Commissioner*, 78 T.C. 19 (1982); *Estate of DiPalma v. Commissioner*, 71 T.C. 324 (1978). Other cases have gone further and held that reliance upon a professional constitutes reasonable cause as a matter of law. *In re Fisk's Estate*, 203 F.2d 358 (6th Cir. 1953); *Haywood Lumber & Mining Co. v. Commissioner*, 178 F.2d 769 (2d Cir. 1950). Finally, a third line of cases has held that the taxpayer's duty to file is nondelegable, so that reliance upon an

attorney or accountant to prepare and file the return may not constitute reasonable cause. *Laney v. Commissioner*, 674 F.2d 342 (5th Cir. 1982); *Boeving v. United States*, 650 F.2d 493 (8th Cir. 1981); *Fleming v. United States*, 648 F.2d 1122 (7th Cir. 1981); *Lillehei v. Commissioner*, 638 F.2d 65 (8th Cir. 1981); *United States v. Kroll*, 547 F.2d 393 (7th Cir. 1977).

As was observed by District Judge, now Circuit Judge, John R. Gibson in a similar case arising in this District, the cases subscribing to the various lines of authority reviewed above are not reconcilable. *Corum v. United States*, 82-1 U.S.T.C. ¶ 13,450 (W.D.Mo. 1982). Strong policy arguments have been advanced on behalf of each position, particularly in the opinions filed in the cases out of the Court of Appeals for the Seventh Circuit, which has modified its position twice. *Fleming, supra; Rohrabaugh, supra; Kroll, supra.* We are not in a position to weigh these arguments, as the Court of Appeals for the Eighth Circuit has now spoken definitively on this issue, holding that reliance on professionals to file on time does not constitute reasonable cause to miss statutory deadlines. *Boeving, supra; Lillehei, supra.* These cases dictate that the decision in this case must be for defendant.[4] Accordingly, it is hereby

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4. An argument could be advanced that even if Doring was not justified in relying on Harris' mistaken views concerning the due date of the return, she was justified in relying on Sanger's advice that no penalty would be assessed for the period after the estimated payments were made. The Court has not located a case in the "nondelegable duty" line of cases addressing this issue, but reasons that the result would not be altered by this factual twist. Sanger's advice was not comparable to advice that the return need not be filed. Rather, he advised that the return need not be filed on time. In effect, Sanger's statements were advice as to when the return should be filed, advice which the thrust of the "nondelegable duty" cases would hold Doring was not entitled to rely on.

ORDERED that defendant's motion for summary judgment be granted.

ORDERED that plaintiff's motion for summary judgment by denied.

ORDERED that judgment be entered in favor of defendant, with costs to be assessed against plaintiff.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: March 9, 1983

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1500

Estate of Jessie E. Kerber,
Helen Doring, Executrix,
Appellant,

v.

United States of America,
Appellee.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: September 14, 1983
Filed: September 23, 1983

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

PER CURIAM.

Helen Doring, the executrix of the estate of Jessie E. Kerber, brought an action seeking a refund of amounts assessed by the Internal Revenue Service (IRS) as penalties for the late filing of an estate tax return and the late payment of the tax owed by the estate. The executrix also sought recovery of administrative expenses incurred to prosecute the refund claim. She now appeals the order of the district court granting summary judgment in favor of the United States. We affirm.

Jessie Kerber died on October 10, 1977. Pursuant to the terms of Kerber's will, Helen Doring was appointed executrix of the estate. After her appointment Mrs. Doring retained the services of an attorney to handle the affairs of the estate and to represent her in her capacity as executrix. Although Mrs. Doring's attorney correctly advised her that it would be necessary to file an estate tax return, he erroneously believed that the return was due one year after the decedent's death.[1] The return was in fact due on July 10, 1978, nine months after Kerber's death. I.R.C. § 6075(a).

On the advice of the attorney for the estate, Mrs. Doring hired a certified public accountant on March 29, 1978 to prepare the estate tax return.[2] In the next few months, the executrix made a number of inquiries of the accountant concerning his progress in preparing the return. After ascertaining that he had completely neglected work on the return, Mrs. Doring discharged him and on June 15, 1978 employed another certified public accountant.

As a result of his erroneous belief concerning the deadline for filing the estate tax return, counsel for the estate did not provide the second accountant with any information about the estate, including the date of the decedent's death, until August 2, 1978. Upon being informed of the date of death, the second accountant immediately realized that the return was past due. He therefore sought

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1. Counsel for the estate testified that he did not remember informing Mrs. Doring of a specific due date for the estate tax return. He stated, however, that if he had informed her of the date, he would have told her that the return was due twelve months after Kerber's death. Mrs. Doring testified that while she could not remember the exact due date stated by her attorney, he did mention a specific date.

2. At his deposition, the estate's attorney testified that while his practice included probate work, he had no experience in preparing federal estate tax returns.

an extension of time for filing the return[3] and submitted a check for $80,000.00 signed by Mrs. Doring as payment of estimated taxes owed by the estate. Several days later, an additional $23,000.00 in estimated estate taxes was submitted to the IRS.[4] After receiving all the information necessary to prepare a complete return, the accountant filed the estate tax return on October 10, 1978.

The IRS audited the tax return and assessed a penalty of $19,004.22 for failure to file a timely return, I.R.C. § 6651(a)(1), and an additional $400.84 for late payment of the tax owed, *id.* § 6651(a)(2). The executrix seeks recovery of these amounts and of $2,200.00 in administrative expenses incurred in connection with her refund claim.

A taxpayer is liable for delinquency penalties unless the failure to timely file the estate tax return and pay the tax owed is due to reasonable cause. I.R.C. §§ 6651(a)(1), (2). To establish that the late filing and payment were reasonable, the taxpayer must show that he "exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." 26 C.F.R. § 301.6651-1(c)(1). In the instant case, the executrix argues that she exercised ordinary business care and prudence in relying on the advice of the attorney for the estate and the second accountant regarding due dates and penalties. The district court concluded, based on

3. In its order the district court noted that the record before it did not indicate what action, if any, the IRS took on the estate's request for an extension of time. In light of further penalty assessments, however, the court presumed that the request was denied. *Estate of Kerber v. United States,* No. 81-6061-CV-SJ, slip op. at 3 n.3 (W.D. Mo. March 9, 1983).

4. The accountant mistakenly believed that payment of estimated estate taxes would prevent the imposition of any further delinquency penalty. He so advised the executrix and the attorney for the estate.

this court's decisions in *Estate of Lillehei v. Commissioner*, 638 F.2d 65 (8th Cir. 1981), and *Boeving v. United States*, 650 F.2d 493 (8th Cir. 1981), that reliance on the advice of professionals did not provide reasonable cause to miss the statutory deadline.

We agree with the district court that the executrix failed to demonstrate reasonable cause for the late filing of the estate tax return and the late payment of the tax owed by the estate. In *Boeving* we stated that "[t]he executor or executrix has a personal and nondelegable duty to file a timely return, and reliance on the mistaken advice of counsel is not sufficient to constitute 'reasonable cause' for failing to fulfill that duty." 650 F.2d at 495. Although in our later decision in *Smith v. United States*, 702 F.2d 741 (8th Cir. 1983), we noted that "[*Boeving* and *Estate of Lillehei*] do not establish a rule of law that a personal representative's reliance on counsel can *never* constitute reasonable cause," 702 F.2d at 743 (emphasis in original), we reaffirmed our adherence to the rule set forth in *Boeving*. Our recent decision in *Crouse v. United States*, 711 F.2d 102 (8th Cir. 1983), likewise demonstrates this court's continued support for this principle. The executrix in the instant case has failed to show any facts that distinguish this case from our earlier decisions.[5] Therefore, we conclude that the district court properly granted summary judgment in favor of the United States.

Accordingly, the judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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5. We note that a recent Seventh Circuit decision, *Boyle v. United States*, 710 F.2d 1251 (7th Cir. 1983), may take a different view.

No. 83-1038

In the Supreme Court of the United States

OCTOBER TERM, 1983

HELEN DORING, EXECUTRIX OF THE ESTATE OF
JESSIE E. KERBER, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 6651(a)(1) of the Internal Revenue Code imposes a penalty for failure to file a tax return on time, "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." The question presented is whether a taxpayer's reliance on tax advisors to prepare a return for her constitutes "reasonable cause" sufficient to defeat the late-filing penalty, where the return is filed late in part because of the advisors' negligence.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A10) is reported at 717 F.2d 454. The opinion of the district court (Pet. App. A1-A6) is unofficially reported at 83-1 U.S. Tax Cas. (CCH) para. 13,524.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7) was entered on September 23, 1983. The petition for a writ of certiorari was filed on December 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Jessie E. Kerber died on October 10, 1977. Under her will, petitioner Helen Doring was appointed executrix of her estate. Petitioner was 76 years old at the time of her

appointment and had previously been employed as a bank teller and a bookkeeping clerk (Pet. App. A2). Shortly after decedent's death, petitioner retained Michael P. Harris to serve as attorney for the estate (*ibid.*). Harris had practiced law for 12 years; his practice included probate work, but did not include preparation of federal estate tax returns (*id.* at A2, A8 n.2).

In discussing petitioner's duties as executrix, Harris explained that the estate would probably be required to file an estate tax return (Pet. App. A2; H. Dep. 4-5).[1] Harris testified that he could not recall advising petitioner of a specific deadline for filing the return, but stated that, if he had so informed her, he would have told her that the return was due 12 months after the date of Kerber's death (Pet. App. A2, A8 n.1; H. Dep. 12, 15). This information would have been erroneous; Section 6075(a) of the Code[2] provides that an estate tax return "shall be filed within 9 months after the date of the decedent's death." Petitioner testified as to her belief that Harris, at some point, had mentioned a specific date for filing the return, but she could not remember what Harris had said (Pet. App. A2, A8 n.1; D. Dep. 12-13, 16).

On March 29, 1978, about six months after Kerber's death, petitioner retained an accountant to prepare the estate tax return (Pet. App. A2-A3). After several inquiries, petitioner ascertained that the accountant was making no progress in preparing the return and discharged him (*id.* at A3). On June 15, 1978, petitioner formally retained another

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[1]"H. Dep." refers to the deposition of Michael P. Harris, and "D. Dep." refers to the deposition of Helen Doring, both of which were introduced into evidence in the district court.

[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended ("the Code" or "I.R.C.").

accountant (*ibid.*). Harris had previously told the new accountant that an estate tax return had to be filed, but failed to alert him as to the date of Kerber's death (H. Dep. 10-11). Harris did not inform the accountant of the date of death, or provide him with any other information about the estate, until August 2, 1978, by which time the estate tax return was already three weeks past due (Pet. App. A3). Harris attributed this delay to his and the accountant's vacation schedules and to his erroneous belief that the estate tax return was due 12 months after Kerber died, so that "there was no particular emergency to do anything" (H. Dep. 11-12). Upon discovering the date of death, the accountant realized that the return was overdue and sent a check to the I.R.S. for the estate taxes he estimated to be owing (Pet. App. A3).[3] The return itself was eventually filed on October 10, 1978, three months late (*ibid.*).

2. Section 6651(a)(1) imposes an "addition to the tax," commonly referred to as a "penalty," for failure to file a tax return (including an estate tax return) on time. The penalty is 5% of the amount "required to be shown as tax on such return" for each month the return is delinquent, up to a maximum of 25% in the aggregate. The penalty is applicable unless the taxpayer demonstrates that his failure to file on time was "due to reasonable cause and not due to willful neglect" (*ibid.*). A delay is due to reasonable cause "[i]f the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the

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[3]The accountant also filed with the I.R.S. a request for an extension of time to file the estate tax return (Pet. App. A3). The record does not reveal what became of this request, but the district court correctly surmised that it had been denied (*id.* at A3 n.3). The Regulations require that a request for an extension of time to file a return be submitted in writing "on or before the due date of such return." Treas. Reg. § 1.6081-1(b)(1). The accountant did not submit his request until August 2, 1978, some three weeks after the due date had passed.

prescribed time." Treas. Reg. § 301.6651-1(c)(1). Section 6651(a)(2) imposes a similar penalty for failure to pay a tax when due.

The Commissioner determined that "reasonable cause" had not been shown for late filing of the return or for late payment of the tax. He accordingly asserted penalties against the estate in the amounts of $19,004 under Section 6651(a)(1) and $401 under Section 6651(a)(2) (Pet. App. A9). Petitioner paid the penalties and sued for a refund in the United States District Court for the Western District of Missouri, alleging that she had relied on the estate's tax advisors to file a timely return and that such reliance constituted "reasonable cause" for the late filing (*id.* at A4).

3. On cross motions for summary judgment, the district court awarded summary judgment in favor of the government (Pet. App. A1-A6). The court noted that two factual issues remained in dispute: whether Harris had informed petitioner of the filing date, and what the nature and extent of petitioner's contacts with Harris were concerning the probate administration (*id.* at A2 n.1). But the court held that it "need not decide whether genuine issues exist[ed] as to these factual matters," reasoning that "the facts [were] not material to [its] decision" in light of Eighth Circuit precedents (*ibid.*). Noting that "the Eighth Circuit [had] spoken definitively on [the] issue," the district court held as a matter of law that "reliance on professionals to file on time does not constitute reasonable cause to miss statutory deadlines." *Id.* at A5 (citing *Boeving* v. *United States,* 650 F.2d 493 (8th Cir. 1981); *Estate of Lillehei* v. *Commissioner,* 638 F.2d 65 (8th Cir. 1981)).

The court of appeals affirmed in a per curiam opinion (Pet. App. A7-A10). It reiterated the principle, established in a long line of Eighth Circuit cases, that "[t]he executor or executrix has a personal and nondelegable duty to file a

timely return," and that reliance on tax advisors "is not sufficient to constitute 'reasonable cause' for failing to fulfill that duty." *Id.* at A10 (quoting *Boeving,* 650 F.2d at 495). The court noted (Pet. App. A10 n.5) that its holding conflicted with the Seventh Circuit's decision in *United States* v. *Boyle,* 710 F.2d 1251 (1983), petition for cert. pending, No. 83-1266.

DISCUSSION

1. This case presents a question identical to that presented in *United States* v. *Boyle*, No. 83-1266. As we contend in our petition for certiorari in that case, the court of appeals here correctly held that reliance on tax advisors does not establish "reasonable cause" sufficient to defeat the statutory penalty for the negligent late filing of a tax return. 83-1266 Pet. 7-11. The Eighth Circuit's holding to this effect reaffirms a long line of is own precedents (*e.g.*, *Crouse* v. *United States,* 711 F.2d 102 (1983); *Smith* v. *United States,* 702 F.2d 741 (1983); *Boeving, supra; Estate of Lillehei, supra*), and is in accord with the views of the Fifth and Ninth Circuits. See *Millette & Associates, Inc.* v. *Commissioner,* 594 F.2d 121, 124-125 (5th Cir.), cert. denied, 444 U.S. 899 (1979); *Logan Lumber Co.* v. *Commissioner,* 365 F.2d 846, 854 (5th Cir. 1966); *Dritz* v. *Commissioner,* 28 T.C.M. (CCH) 874 (1969), aff'd per curiam, 427 F.2d 1176 (5th Cir. 1970); *Ferrando* v. *United States,* 245 F.2d 582 (9th Cir. 1957). As the court below noted (Pet. App. A10 n.5), however, its decision conflicts with the Seventh Circuit's holdings in *Boyle* and in *Rohrabaugh* v. *United States,* 611 F.2d 211 (1979). In those cases, the Seventh Circuit adopted a facts-and-circumstances test, holding that reliance on tax advisors may constitute "reasonable cause" sufficient to defeat the late-filing penalty depending on whether the executor has significant business experience, is informed of the return's due date, and maintains regular contact with the estate's tax advisors concerning progress on the return. *E.g., Boyle,* 710 F.2d at 1252-

1253; *Rohrabaugh*, 611 F.2d at 216-219. Because of the square conflict in the circuits and the administrative importance of the issue, we urge that certiorari be granted in *Boyle*. 83-1266 Pet. 11-13.

2. We think that *Boyle*, because of its clearer factual record, offers a somewhat better vehicle for deciding the legal issue involved. Although we believe that the availability of a "reliance on counsel" defense to the late-filing penalty should generally not turn on the facts of a particular case, that view has not been shared by some lower courts (particularly the Seventh Circuit) that have considered the question. As petitioner here acknowledges (Pet. 3-4 & n.1), "the record is not clear" in this case as to two important facts—whether the estate's tax advisors informed petitioner of the return's due date, and, if so, whether the date of which they informed her was the correct one. See page 2, *supra*. As the district court noted below (Pet. App. A2 n.1), moreover, the precise nature and extent of petitioner's contacts with Harris concerning progress of the probate administration is also in dispute here. The trial court did not resolve these uncertainties, holding that it "need not decide whether genuine issues exist[ed] as to these factual matters, [since] the facts [were] not material to [its] decision" (*ibid.*) under Eighth Circuit precedents holding the "reliance on counsel" defense unavailable as a matter of law.

Since a number of courts (including the Seventh Circuit) have found facts of this sort pertinent in determining the availability of the "reliance on counsel" defense (see, *e.g.*, *Rohrabaugh*, 611 F.2d at 216-218), and since there is no ambiguity as to the analogous facts in the *Boyle* case (see 83-1266 Pet. 2-3), we suggest that the Court grant certiorari in No. 83-1266 and hold this case pending decision there. Alternatively, if the Court deems it beneficial to have the divergent factual patterns before it as an aid to decision, we

urge that certiorari be granted in both cases. In the latter event, the Court may wish to consolidate the cases for briefing and argument.

CONCLUSION

If certiorari is granted in No. 83-1266, the instant petition should be held pending decision there. Alternatively, both petitions should be granted and the cases consolidated for briefing and argument.

Respectfully submitted.

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